

ORDER OF THE OFFICE OF THE COMMISSIONER OF INSURANCE CREATING A RULE

To create Ins 6.60, Wis. Adm. Code, relating to regulations concerning agent transactions with customers.

ANALYSIS PREPARED BY THE OFFICE OF THE COMMISSIONER OF INSURANCE

Statutory authority: ss. 227.11 (2) (a) & (c), 600.01 (2), 601.41 (3), 628.34 (12), Stats.

Statutes interpreted: ss. 600.01, 618.39 (1), 628.04 (1), 628.10 (2) (b), 628.34 (12), Stats.

In general insurance agents occupy a position of trust and credibility with their customers. Customers permit these agents to enter their homes and to acquire financial and other personal information. Most agents merit this trust and respect the responsibility it engenders. Unfortunately a few agents abuse this confidence and engage in non-insurance transactions with customers that are not in the customer's best interest.

There are recent examples of this type of abuse:

Out of state promoters of illegal "corporate promissory note" programs have specifically recruited insurance agents (most not licensed as securities agents) to illegally market millions of dollars in illiquid unregistered securities to their customers in Wisconsin. These programs resulted in devastating financial loss to Wisconsin citizens who placed their trust in the agents relying in part on their status as licensed insurance agents.

Several insurance agents have sold investments in viatical settlements to their customers for commissions without exploring or understanding the risks and securities law implications of these sales.

Several agents borrowed money from customers or encouraged customers to invest in businesses controlled by the agents. Often the funds loaned or invested are derived from life insurance settlements or liquidated annuities.

Wisconsin and federal securities law prohibits certain personal financial transactions with customers by securities agents as "dishonest or unethical business practices" or "taking unfair advantage of a customer." This conduct includes borrowing from a

customer and acting as custodian for money or securities of a customer. Securities agents are required to disclose all securities transactions to their employing broker-dealers and obtain the broker-dealer's written authorization for any "off the books" transactions. Some insurers also prohibit their listed insurance agents from borrowing from customers. The proposed rule incorporates normal standards of ethical behavior that prudent agents practice and their customers deserve and expect. This rule does not place an unnecessary burden on the legitimate business of insurance.

S. 628.10 (2) (b) Stats., allows the commissioner to "...revoke, suspend,...the license of any intermediary if the commissioner finds that the licensee is unqualified as an intermediary, is not of good character or has repeatedly or knowingly violated an insurance statute or rule... of the commissioner... , or if the intermediary's methods and practices in the conduct of business endanger, or financial resources are inadequate to safeguard, the legitimate interests of customers and the public..." The proposed rule will specifically prohibit conduct that falls within the proscriptions of this statute without limiting the types of conduct that constitute grounds for license sanction. The rule will assist agents and others to determine when conduct with customers is prohibited and places an agent's insurance license at risk.

The rule defines personal financial transactions and prohibits agents from engaging in such transactions with persons with whom they have conducted insurance business within 3 years prior to the transaction. Transactions with relatives and bona fide business transactions with customers are allowed as long as there are sufficient safeguards to protect the customer's interests. The rule incorporates violations of state and federal securities and other related laws and prohibits misleading statements regarding an agent's training and qualifications.

This proposed rule incorporates specific guidelines concerning insurance agents who engage in sales of illegal multiple employer welfare trusts and other forms of group health insurance by unauthorized insurers. Typically conducted under the false guise of being "ERISA" or federally-governed and thus exempt from state regulation these plans frequently are self-funded and fail, leaving unpaid claims and lost premiums. OCI has held agents who participate in these programs to strict standards of accountability. This rule codifies the position of OCI that agents may not escape responsibility by citing their reliance on the pronouncements of the promoters that the program is "exempt from state regulation" under ERISA. This strict standard is in keeping with the professional standards that everyone expects from their insurance

professionals. This rule makes it clear that an agent who participates in sales of these illegal plans commits an unfair trade practice in violation of s. 628.34 (12) Stats., and violates s. 618.39 Stats. by assisting an unauthorized insurer.

Section 628.34 Stats., defines and prohibits unfair marketing (trade) practices. Sub. (11) prohibits “other unfair trade practices” including “any other unfair or deceptive act or practice in the business of insurance, as defined in sub. (12).” Sub. (12) allows the commissioner to define additional “ specific unfair trade practices by rule, after a finding that they are misleading, deceptive, unfairly discriminatory, provide an unfair inducement, or restrain competition unreasonably.” This is the statutory authority for the proposed rule. While the conduct proscribed by this rule may involve misrepresentation or unfair inducement as described in sections 628.34 (1) & (2) Stats., it also constitutes unfair trade practices and unfair or deceptive acts or practices in the business of insurance within the meaning of s. 628.34 (11) Stats.

The Commissioner finds that the conduct prohibited by this rule is misleading, deceptive, unfairly discriminatory, provides an unfair inducement and restrains competition unreasonably within the meaning of s. 628.34 (12) Stats., and finds further that sales of unauthorized insurance as ERISA-exempt in violation of s. 618.39 Stats., are harmful to the public and that agents who become involved in the marketing or placement of these plans must be held strictly accountable for their actions.

SECTION 1. Section Ins 6.60 is created to read:

Ins 6.60 Prohibited business practices. (1) In this section:

- (a) “Affiliate” means any person who is under the control of or acts at the direction of the agent.
- (b) “Agent” means an intermediary as defined in s. 628.02, Stats.
- (c) “Customer” means a natural person with whom the agent or affiliate is doing or has, within 3 years from the act or transaction regulated by this section, done an insurance business as that term is defined in s. 618.02 (2) and (3), Stats.
- (d) “Personal financial transaction” includes a transaction in which the agent or an affiliate of the agent borrows money, property or securities from a customer; loans money, property or securities to a customer; acts as custodian for money, property or securities of a customer; obtains power of attorney over money, property or securities of a customer; obtains a guarantee of any loan from a customer; shares directly or indirectly in profits or losses with a customer; or without furnishing equal consideration obtains title to or ownership of any property of a customer. In this section “personal financial transaction” does not include transactions conducted by an agent or affiliate in the normal course of doing an insurance business such as holding an insurance policy for analysis or servicing, or receiving an insurance premium from a customer provided the transaction is properly recorded on the records of the agent or affiliate as required by s. Ins 6.61, including the name of the insurer for whom the premium was received, and the agent or affiliate immediately issues a written receipt to the customer for the policy or premium.

(2) The following are deemed to be unfair trade practices by an agent or affiliate pursuant to s. 628.34 (12), Stats., without limiting those terms to the practices specified in this section:

- (a) Effecting or attempting to effect a personal financial transaction with a customer unless any of the following apply :
 - 1. The customer is a relative of the agent or affiliate as defined in s. 13.62 (12g), Stats.
 - 2. The customer is a person residing in the household of the agent or affiliate at the time of the transaction.

3. The transaction is a bona fide arm's length business transaction where the customer is either qualified to understand and assess the transaction or has been advised or represented in the transaction by a qualified individual who is not the agent or affiliate.

4. The agent or affiliate is acting lawfully pursuant to authority given under federal or state law governing the securities or investment advisory business.

- (b) Knowingly being listed as a beneficiary of any proceeds of a life insurance policy or annuity issued to a customer unless the agent or affiliate has an insurable interest in the life of the customer.
 - (c) Engaging in transactions with a customer in violation of ch. 551, Stats., the Wisconsin uniform securities law, ch. 553, Stats., the Wisconsin franchise investment law, the U.S. securities act of 1933 (15 USCS 77a et seq), the U. S. securities exchange act of 1934 (15 USCS 78a-78kk), the U. S. investment company act of 1940 (15 USCS 80 a-1 – 80a-52), or any rules or regulations promulgated under any of such laws.
 - (d) Making misleading statements to a customer regarding or otherwise misrepresenting one's qualifications or services. This includes using terms such as "financial", "investment" or "retirement" in conjunction with terms such as "planner", "planning" or "consulting" when, under the circumstances, the statements, representations or use of these terms do not accurately describe the nature of the services offered or the qualifications of the person offering the services.
 - (e) Selling, soliciting the sale, or assisting the sale, of health coverage that is:
 - 1. Provided by a person who is not licensed as an insurer in this state; and
 - 2. Represented to be authorized under, or exempt from state insurance regulation under, the federal employee retirement income security act (29 USCS 1001 et seq).
- (3) (a) For the purpose of s. 618.39 (1), Stats., an agent should know that placement of insurance is illegal if the agent:
- 1. Sells, solicits the sale, or assists in the sale, of health coverage offered by a person not licensed as an insurer in this state; and
 - 2. Knows that the health coverage is represented to be authorized, or exempt from state insurance regulation, under the federal employee retirement income security act (29 USCS 1001 et seq).

(b) An agent's lack of knowledge of any of the following is not a defense to a violation of s. 618.39 (1), Stats.:

1. That the person providing the coverage is not licensed in this state.
2. That the person is an insurer as defined under s. 600.03 (27), Stats.
3. That the represented authorization or exemption under the federal employee retirement income security act is false (29 USCS 1001 et seq).

(4) The commissioner shall order, for any agent who violates s. 618.39, Stats., not less than revocation of the agent's license and that the agent pay any claims not paid within 60 days by the unauthorized insurer. An agent may establish the basis for a lesser penalty for a violation of s. 618.39, Stats, only if the agent shows all of the following:

- (a) Substantial mitigating factors.
- (b) The agent made, and solicited to make, only a few sales of the coverage.
- (c) The agent did not serve as a general agent, was not eligible for override commissions, and was not responsible for recruiting, and did not recruit, other agents to sell the coverage.

(5) A violation of sub. (2) is a cause for denial of an agent license application under s. 628.04 (1), Stats., and a cause for agent license suspension, revocation or limitation under s. 628.10 (2) (b), Stats.

SECTION 2. This rule shall take effect on the first day of the first month after publication, as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin, this 30th day of November, 2001.

Connie L. O'Connell
Commissioner of Insurance